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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Rodney Cabrera De La Rosa,
Plaintiff,

v.

Joseph M. Arpaio, et al.,
Defendants.

No. CV 15-0715-PHX-DGC (JFM)

ORDER

On April 20, 2015, Plaintiff Rodney Cabrera De La Rosa, who is confined in the Maricopa County Durango Jail, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. In a May 15, 2015 Order, the Court granted the Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On May 13, 2015, Plaintiff filed a Motion for Entry of Default (Doc. 6). On June 8, 2015, Plaintiff filed his First Amended Complaint (Doc. 10) and a letter.¹ The Court will dismiss the First Amended Complaint with leave to amend.

¹ The relief Plaintiff seeks in the letter is unclear and the Court will therefore take no action regarding it. Plaintiff should note it is improper for a party to communicate directly with court personnel. Simply mailing a letter to the Clerk of Court, the judge, or any court personnel is unacceptable. Any request for action by the Court must be in the form of a motion that complies with the Rules of Practice of the United States District Court for the District of Arizona (the Local Rules). Any future letters directed to the Clerk of Court, the judge, or any court personnel will be stricken from the record and will be returned to Plaintiff.

I. Motion for Default

In his May 13, 2015 Motion for Default, Plaintiff asks that the Court grant Plaintiff relief because Defendants have not responded to his Complaint. Defendants have not been served and the Court has not completed statutory screening. Accordingly, the Court will deny the Motion.

II. Statutory Screening of Prisoner Complaints

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised claims that are legally frivolous or malicious, that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1)–(2).

A pleading must contain a “short and plain statement of the claim *showing* that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not demand detailed factual allegations, “it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. Thus, although a plaintiff’s specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other “more likely explanations” for a defendant’s conduct. *Id.* at 681.

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1 But as the United States Court of Appeals for the Ninth Circuit has instructed,
 2 courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338,
 3 342 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less
 4 stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v.*
 5 *Pardus*, 551 U.S. 89, 94 (2007) (*per curiam*)).

6 If the Court determines that a pleading could be cured by the allegation of other
 7 facts, a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal
 8 of the action. *See Lopez v. Smith*, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*).
 9 Plaintiff’s First Amended Complaint will be dismissed for failure to state a claim, but
 10 because it may possibly be amended to state a claim, the Court will dismiss it with leave
 11 to amend.

12 **III. First Amended Complaint**

13 Plaintiff names the following Defendants in the First Amended Complaint:
 14 Maricopa County Sheriff Joseph M. Arpaio and Detention Officers A4869, A6501,
 15 B1492, A5115, B2678, B0967, B2330, B2699, B9180, B3208, B4510, A9663, and
 16 A8346. Plaintiff raises three claims for relief.

17 In Count One, Plaintiff alleges that food is served twice per day, but should be
 18 served three times per day. Plaintiff states that Defendants say the two meals are “equal
 19 to 2200-2600 calories. If it could . . . be served in 3 portions to show us how it physically
 20 looks like. . . it won’t be nice!!” Plaintiff claims he is hungry and suffers anxiety,
 21 depression, stomachaches, and headaches. In Count Two, Plaintiff alleges that housing
 22 units are “extremely cold . . . 69-70 degrees” and inmates have to use blankets while in
 23 the day room. In Count Three, Plaintiff claims Defendants B1492, B4510, A9663, and
 24 A8346 lied to him when they told him other inmates were not filing grievances regarding
 25 the cold temperature in the housing unit. Plaintiff seeks injunctive relief and monetary
 26 damages.

1 **IV. Failure to State a Claim**

2 Section 1983 provides a cause of action against persons acting under color of state
3 law who have violated rights guaranteed by the United States Constitution and federal
4 law. 42 U.S.C. § 1983; *see also Buckley v. City of Redding*, 66 F.3d 188, 190 (9th Cir.
5 1995). Plaintiff has failed to allege any constitutional or federal-law violations. The
6 Court will therefore dismiss without prejudice Plaintiff's First Amended Complaint
7 because it fails to state a claim.

8 A pretrial detainee's claim for unconstitutional conditions of confinement arises
9 from the Fourteenth Amendment Due Process Clause rather than from the Eighth
10 Amendment prohibition against cruel and unusual punishment. *Bell v. Wolfish*, 441 U.S.
11 520, 535 and n.16 (1979). Nevertheless, the same standards are applied, requiring proof
12 that the defendant acted with deliberate indifference. *See Frost v. Agnos*, 152 F.3d 1124,
13 1128 (9th Cir. 1998).

14 Deliberate indifference is a higher standard than negligence or lack of ordinary
15 due care for the prisoner's safety. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). To
16 state a claim of deliberate indifference, plaintiffs must meet a two-part test. "First, the
17 alleged constitutional deprivation must be, objectively, sufficiently serious"; and the
18 "official's act or omission must result in the denial of the minimal civilized measure of
19 life's necessities." *Id.* at 834 (internal quotations omitted). Second, the prison official
20 must have a "sufficiently culpable state of mind," i.e., he must act with "deliberate
21 indifference to inmate health or safety." *Id.* (internal quotations omitted). In defining
22 "deliberate indifference" in this context, the Supreme Court has imposed a subjective
23 test: "the official must both be aware of facts from which the inference could be drawn
24 that a substantial risk of serious harm exists, *and* he must also draw the inference." *Id.* at
25 837 (emphasis added).

26 Even if the Court construes Plaintiff's claims as raised pursuant to the Fourteenth
27 Amendment, Plaintiff has not alleged sufficient facts to state a Fourteenth Amendment
28 claim in any of his grounds for relief. In Count One, Plaintiff does not allege specific

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1 Defendants are aware of a serious risk of harm to his health as a result of receiving only
2 two meals per day, and that that specific Defendant failed to act.

3 In Count Two, Plaintiff does not allege facts demonstrating a serious risk of harm
4 to his health. Plaintiff alleges that his housing unit is typically 69 to 70 degrees and that
5 it should be 70 to 73 degrees; a difference this slight does not pose a serious risk of harm
6 to Plaintiff's health and does not rise to the level of a constitutional violation.

7 In Count Three, Plaintiff claims four Defendants falsely told him no other inmates
8 were filing grievances regarding the unit's temperature. Plaintiff does not explain how
9 this violates his constitutional rights.

10 Plaintiff has therefore failed to state a claim in Counts One, Two, or Three of the
11 First Amended Complaint.

12 **V. Leave to Amend**

13 For the foregoing reasons, Plaintiff's First Amended Complaint will be dismissed
14 for failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff
15 may submit a second amended complaint to cure the deficiencies outlined above. The
16 Clerk of Court will mail Plaintiff a court-approved form to use for filing a second
17 amended complaint. If Plaintiff fails to use the court-approved form, the Court may
18 strike the second amended complaint and dismiss this action without further notice to
19 Plaintiff.

20 Plaintiff must clearly designate on the face of the document that it is the "Second
21 Amended Complaint." The second amended complaint must be retyped or rewritten in
22 its entirety on the court-approved form and may not incorporate any part of the original
23 Complaint or First Amended Complaint by reference. Plaintiff may include only one
24 claim per count.

25 In each count, Plaintiff must write short, plain statements telling the Court: (1) the
26 constitutional right Plaintiff believes was violated; (2) the name of the Defendant who
27 violated the right; (3) exactly what that Defendant did or failed to do; (4) how the action
28 or inaction of that Defendant is connected to the violation of Plaintiff's constitutional

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right; and (5) what specific injury Plaintiff suffered because of that Defendant's conduct. *See Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

Plaintiff must repeat this process for each person he names as a Defendant. If Plaintiff fails to affirmatively link the conduct of each named Defendant with the specific injury suffered by Plaintiff, the allegations against that Defendant will be dismissed for failure to state a claim. **Conclusory allegations that a Defendant or group of Defendants has violated a constitutional right are not acceptable and will be dismissed.**

A second amended complaint supersedes the original Complaint and First Amended Complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992); *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat the original Complaint and First Amended Complaint as nonexistent. *Ferdik*, 963 F.2d at 1262. Any cause of action that was raised in the original complaint or first amended complaint and that was voluntarily dismissed or was dismissed without prejudice is waived if it is not alleged in a second amended complaint. *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (en banc).

VI. Warnings

A. Release

If Plaintiff is released while this case remains pending, and the filing fee has not been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court that he intends to pay the unpaid balance of his filing fee within 120 days of his release or (2) file a non-prisoner application to proceed *in forma pauperis*. Failure to comply may result in dismissal of this action.

B. Address Changes

Plaintiff must file and serve a notice of a change of address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other relief with a notice of change of address. Failure to comply may result in dismissal of this action.

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1 **C. Copies**

2 Plaintiff must submit an additional copy of every filing for use by the Court. *See*
3 LRCiv 5.4. Failure to comply may result in the filing being stricken without further
4 notice to Plaintiff.

5 **D. Possible “Strike”**

6 Because the First Amended Complaint has been dismissed for failure to state a
7 claim, if Plaintiff fails to file a second amended complaint correcting the deficiencies
8 identified in this Order, the dismissal may count as a “strike” under the “3-strikes”
9 provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring
10 a civil action or appeal a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the
11 prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility,
12 brought an action or appeal in a court of the United States that was dismissed on the
13 grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be
14 granted, unless the prisoner is under imminent danger of serious physical injury.” 28
15 U.S.C. § 1915(g).

16 **E. Possible Dismissal**

17 If Plaintiff fails to timely comply with every provision of this Order, including
18 these warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963
19 F.2d at 1260-61 (a district court may dismiss an action for failure to comply with any
20 order of the Court).

21 **IT IS ORDERED:**

22 (1) Plaintiff’s May 13, 2015 Motion for Entry of Default (Doc. 6) is **denied**.

23 (2) The First Amended Complaint (Doc. 10) is **dismissed** for failure to state a
24 claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended
25 complaint in compliance with this Order.

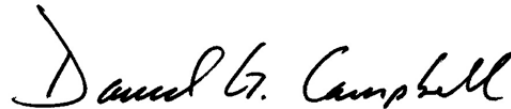
26 (3) If Plaintiff fails to file a second amended complaint within 30 days, the
27 Clerk of Court must, without further notice, enter a judgment of dismissal of this action
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1 with prejudice that states that the dismissal may count as a “strike” under 28 U.S.C.
2 § 1915(g).

3 (4) The Clerk of Court must mail Plaintiff a court-approved form for filing a
4 civil rights complaint by a prisoner.

5 Dated this 6th day of July, 2015.

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David G. Campbell
United States District Judge
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**Instructions for a Prisoner Filing a Civil Rights Complaint
in the United States District Court for the District of Arizona**

1. Who May Use This Form. The civil rights complaint form is designed to help incarcerated persons prepare a complaint seeking relief for a violation of their federal civil rights. These complaints typically concern, but are not limited to, conditions of confinement. **This form should not be used to challenge your conviction or sentence.** If you want to challenge a state conviction or sentence, you should file a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment.
2. The Form. **Local Rule of Civil Procedure (LRCiv) 3.4(a) provides that complaints by incarcerated persons must be filed on the court-approved form.** The form must be typed or neatly handwritten. The form must be completely filled in to the extent applicable. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages, **but no more than fifteen additional pages**, of standard letter-sized paper. You must identify which part of the complaint is being continued and number all pages. If you do not fill out the form properly, you will be asked to submit additional or corrected information, which may delay the processing of your action. You do not need to cite law.
3. Your Signature. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. The Filing Fee. The filing fee for this action is \$350.00. If you are unable to immediately pay the filing fee, you may request leave to proceed *in forma pauperis*. Please review the “Information for Prisoners Seeking Leave to Proceed with a (Non-Habeas) Civil Action in Federal Court *In Forma Pauperis* Pursuant to 28 U.S.C. § 1915” for additional instructions.
5. Original and Judge’s Copy. You must send an **original plus one copy** of your complaint and of any other documents submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.
6. Where to File. You should file your complaint in the division **where you were confined when your rights were allegedly violated.** See LRCiv 5.1(a) and 77.1(a). If you were confined in Maricopa, Pinal, Yuma, La Paz, or Gila County, file in the Phoenix Division. If you were confined in Apache, Navajo, Coconino, Mohave, or Yavapai County, file in the Prescott Division. If you were confined in Pima, Cochise, Santa Cruz, Graham, or Greenlee County, file in the Tucson Division. **Mail the original and one copy of the complaint with the \$350 filing fee or the application to proceed *in forma pauperis* to:**

Phoenix & Prescott Divisions:
U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:
U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. Change of Address. You must immediately notify the Court and the defendants in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. Certificate of Service. You must furnish the defendants with a copy of any document you submit to the Court (except the initial complaint and application to proceed *in forma pauperis*). Each original document (except the initial complaint and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the defendants and the address to which it was mailed. See Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Defendant(s)

(Signature)

9. Amended Complaint. If you need to change any of the information in the initial complaint, you must file an amended complaint. The amended complaint must be written on the court-approved civil rights complaint form. You may file one amended complaint without leave (permission) of Court before any defendant has answered your original complaint. See Fed. R. Civ. P. 15(a). After any defendant has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended complaint. LRCiv 15.1. In addition, an amended complaint may not incorporate by reference any part of your prior complaint. LRCiv 15.1(a)(2). **Any allegations or defendants not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

10. Exhibits. You should not submit exhibits with the complaint or amended complaint. Instead, the relevant information should be paraphrased. You should keep the exhibits to use to support or oppose a motion to dismiss, a motion for summary judgment, or at trial.

11. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

12. Completing the Civil Rights Complaint Form.

HEADING:

1. Your Name. Print your name, prison or inmate number, and institutional mailing address on the lines provided.
2. Defendants. If there are **four or fewer** defendants, print the name of each. If you name **more than four** defendants, print the name of the first defendant on the first line, write the words “and others” on the second line, and attach an additional page listing the names of **all** of the defendants. Insert the additional page after page 1 and number it “1-A” at the bottom.
3. Jury Demand. If you want a jury trial, you must write “JURY TRIAL DEMANDED” in the space below “CIVIL RIGHTS COMPLAINT BY A PRISONER.” Failure to do so may result in the loss of the right to a jury trial. A jury trial is not available if you are seeking only injunctive relief.

Part A. JURISDICTION:

1. Nature of Suit. Mark whether you are filing the complaint pursuant to 42 U.S.C. § 1983 for state, county, or city defendants; “Bivens v. Six Unknown Federal Narcotics Agents” for federal defendants; or “other.” If you mark “other,” identify the source of that authority.
2. Location. Identify the institution and city where the alleged violation of your rights occurred.
3. Defendants. Print all of the requested information about each of the defendants in the spaces provided. If you are naming more than four defendants, you must provide the necessary information about each additional defendant on separate pages labeled “2-A,” “2-B,” etc., at the bottom. Insert the additional page(s) immediately behind page 2.

Part B. PREVIOUS LAWSUITS:

You must identify any other lawsuit you have filed in either state or federal court while you were a prisoner. Print all of the requested information about each lawsuit in the spaces provided. If you have filed more than three lawsuits, you must provide the necessary information about each additional lawsuit on a separate page. Label the page(s) as “2-A,” “2-B,” etc., at the bottom of the page and insert the additional page(s) immediately behind page 2.

Part C. CAUSE OF ACTION:

You must identify what rights each defendant violated. The form provides space to allege three separate counts (**one violation per count**). If you are alleging more than three counts, you must provide the necessary information about each additional count on a separate page. Number the additional pages “5-A,” “5-B,” etc., and insert them immediately behind page 5. Remember that you are limited to a total of fifteen additional pages.

1. **Counts.** You must identify which civil right was violated. **You may allege the violation of only one civil right per count.**
2. **Issue Involved.** Check the box that most closely identifies the issue involved in your claim. **You may check only one box per count.** If you check the box marked “Other,” you must identify the specific issue involved.
3. **Supporting Facts.** After you have identified which civil right was violated, you must state the supporting facts. Be as specific as possible. You must state what each individual defendant did to violate your rights. If there is more than one defendant, you must identify which defendant did what act. You also should state the date(s) on which the act(s) occurred, if possible.
4. **Injury.** State precisely how you were injured by the alleged violation of your rights.
5. **Administrative Remedies.** You must exhaust any available administrative remedies before you file a civil rights complaint. See 42 U.S.C. § 1997e. Consequently, you should disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided.

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

You must sign your name and print the date you signed the complaint. Failure to sign the complaint will delay the processing of your action. Unless you are an attorney, you may not bring an action on behalf of anyone but yourself.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number the pages.

B. DEFENDANTS

1. Name of first Defendant: _____. The first Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)
2. Name of second Defendant: _____. The second Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)
3. Name of third Defendant: _____. The third Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)
4. Name of fourth Defendant: _____. The fourth Defendant is employed as:
_____ at _____.
(Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner? ☐ Yes ☐ No
2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:
 - a. First prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - b. Second prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - c. Third prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or
other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.